NOT FOR PUBLICATION

FILED

NOS. 91-2201 & 92-1429

APR 19 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD GREEN, Clerk

Brian M. Bartley,	90-71419
	D/Gilmore
Plaintiff-Appellant	
	ON APPEAL FROM THE
v.	UNITED STATES DISTRICT
	COURT FOR THE EASTERN
Richard A. Handelsman & Handelsman Venture Group,	DISTRICT OF MICHIGAN
Defendants-Appellees	

NOT RECOMMENDED FOR FULL TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominantely displayed this decision is reproduced.

BEFORE: MILBURN and BATCHELDER, Circuit Judges, and CONTIE, Senior Circuit Judge.

PER CURIAM.

I.

Brian Bartley brought suit against Richard Handelsman and an investment group headed by Handelsman alleging that Bartley, Handelsman and another man had, over breakfast and without written contract, formed a joint venture to seek out and fund promising oil and gas investments.

Bartley's claimed role was to do the legwork, researching potential sites and making any necessary arrangements with owners to obtain leases, set up drilling contracts, and the like. Handelsman apparently would supply the money. Bartley maintained in his original complaint that for his efforts, Handelsman promised him a "ten percent carried interest" in any and all oil and gas prospects that made money; since he would be contributing only his labor and expertise to the joint venture, he would not be liable for any costs or losses the adventurers sustained. The District Court granted the Handelsman defendants' motion for summary judgment, holding that under Michigan law, all joint adventurers had to share in the costs and losses as well as the profits to make out a legal joint venture. We affirm.

II.

The Court of Appeals reviews grants of summary judgment motions *de novo*. In reviewing

a summary judgment disposition, the Court of Appeals must determine whether the party opposing the motion has put forth evidence which, if produced at trial, would withstand the movant's motion for a directed verdict. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989) (citing *Anderson v. Liberty Lobby*, 447 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Of course, the movant must initially show the absence of a genuine issue of material fact. *Street*, 886 F.2d at 1479 (citing *Celotex*, 477 U.S. at 323). A material fact is one which might affect the outcome of the suit. *Liberty Lobby*, 477 U.S. at 248. However, the court must determine whether the evidence before it on a motion for summary judgment "presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Street*, 886 F.2d at 1479 (citing *Liberty Lobby*, 477 U.S. at 252). Bare allegations by the non-moving party will not

alone suffice; they must be supported by sufficient evidence such that "reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Mitchell v. Toledo Hospital*, 964 F.2d 577, 581-82 (6th Cir. 1992) (quoting *Liberty Lobby*, 477 U.S. at 252).

The District Court erred in holding that Mr. Bartley could not be a joint adventurer under Michigan law if he had not agreed to bear any of the venture's risk of costs or losses. A Michigan joint venture may reimburse a joint adventurer acting as a prospector for his services by granting him a percentage interest in the prospects he finds; Michigan law considers the prospector to be risking his up-front "investment" of labor and time in the hopes of getting a future payoff from productive wells. *See Miles v. Fredenhagen*, 309 Mich. 674, 16 N.W.2d 117 (1944).

Where the District Court has erred in its grant of summary judgment, the Court of Appeals

may nonetheless affirm the grant of summary judgment on other grounds.

> [A]n appellate court can find an alternative bases for concluding that a party is entitled to summary judgment and ignore any erroneous basis relied upon by the district court, provided it proceeds carefully so the opposing party is not denied an opportunity to respond to the new theory.

Hansard v. Barrett, 980 F.2d 1059, 1061 (6th Cir. 1992) (quoting *Hines v. Joy Manufacturing Co.*, 850 F.2d 1146, 1150 (6th Cir. 1988)). Because we find that Bartley has failed adequately to define or explain the interest he claims in his suit, and since Bartley has had adequate opportunity to brief and argue this issue before this court, we grant summary judgment in favor of the Handelsman defendants on alternative grounds.

Mr. Bartley runs into trouble in alleging that the joint venturers promised him a ten percent "carried interest" as his primary compensation for his efforts in identifying and researching promising oil and gas prospects. This promise is a material term of the contract

which he alleges, one which would undoubtedly affect the outcome of the suit. *Liberty Lobby*, 477 U.S. at 248. For that reason, Mr. Bartley must put forth sufficient evidence to show that a jury could find that a meeting of the minds occurred on the promised compensation. *Banque de Depots v. National Bank of Detroit*, 491 F.2d 753, 756 (6th Cir. 1974). Were the allegations clear that the parties agreed to grant Mr. Bartley a ten percent "carried interest", the crucial questions would be whether Mr. Handelsman in fact agreed to such a grant at the breakfast meeting, and what specifically he intended to convey; this question would be for the finder of fact and would be beyond the pale of summary judgment. *Guilmet v. Campbell*, 385 Mich. 57, 188 N.W.2d 601 (1971). However, when the non-movant's allegations as to the material terms of an oral contact are in themselves vague, and the evidence used to support them unclear and ambiguous, a court may, as a matter of law, hold that no contract can be made out,

and keep the matter out of a jury's hands. *Kurtz v. Ford Motor Co.*, 62 F. Supp. 255, 257 (E.D. Mich., S. Div. 1945)("Where . . . the integral terms of an oral contract can only be arrived at by an excursion into the realm of conjecture and speculation, the court should not submit to the jury the matter of delineation of such terms.").

Neither the evidence Mr. Bartley puts forth nor the law he has argued is consistent in defining what interest the parties allegedly agreed to grant him. Bartley argues that Handelsman knew what interest he was promising, since a "carried interest" is a term of art in the oil and gas world. The latter is true, but the law recognizes many types of carried interests; the term is not self-defining. *See generally* Eugene Kuntz, *A Treatise on the Law of Oil and Gas* § 63.4 (1991). Simply claiming a "ten percent carried interest" is akin to claiming a "ten percent property interest"; to keep his suit alive, a plaintiff must define the

extent, nature and particularly the value of his claimed interest.

In his complaint, Bartley originally described the carried interest upon which he sued as "ten percent of the gross proceeds" of the various successful prospects he had found. When deposed, Bartley did not clearly define the interest he claims the parties agreed that he would receive, except to claim that it was to be a perpetual ten percent interest in the "cash flow" from the successful projects and that he would not be liable for any of the joint venture's costs or losses. In briefing this Court, Bartley argues that his interest pursuant to the alleged contract really boiled down to a "net profit interest." Again, such an interest is cognizable in oil and gas law, *see Kuntz, Oil and Gas* § 63.5 at 254, but it necessarily entitles the holder only to an interest in the profits, not the revenues, of a drilling venture, *id.*; by definition, an interest in revenues entitles the holder to more money than

does an interest in profits. Also implied in a net profits interest is that the holder bears the costs of production, unlike the holder of a percentage interest in revenues or "gross proceeds." Bartley thus contradicts himself by arguing that the "carried interest" to which he is entitled is at once an interest in revenues, free of liability for costs or losses, and an interest in net profits.

In order to withstand summary judgment in this case, Bartley had to present evidence tending to demonstrate that there is a genuine factual dispute about whether there was a meeting of the minds on some particular set of terms of this alleged contract. Instead, what Bartley has shown is that he himself has no clear notion of the nature of the interest that he claims he is entitled to receive under the contract he alleges. Where the plaintiff's claims arise under an alleged oral contract, and the dispute is over whether there was in fact any such oral contract, the plaintiff may

survive summary judgment by demonstrating that there is a genuine issue of fact as to whether there was ever a meeting of the minds of the parties in regard to the particular terms of that contract. Where the dispute is over a specific term or terms of that alleged contact, the plaintiff may survive summary judgment by providing evidence tending to demonstrate a genuine issue as to whether the parties agreed to the particular term or terms. But here, Bartley claims that the parties entered into an oral contract pursuant to which Bartley was entitled to an interest, which he vaguely describes in varying and wholly inconsistent terms throughout his pleadings and testimony. He has not provided any evidence whatsoever to define that specific interest. If Bartley himself does not know what his interest was to be, he can hardly be heard to claim that there was a meeting of the minds of the parties as to what his interest was to be. Thus, what Bartley has shown is that there was no meeting of the

minds as to that essential term of the alleged contract. And even if Bartley's claim is that there is a genuine dispute as to what that interest was to be, showing a genuine dispute about what was intended simply establishes the fact that there was no meeting of the minds.[1]

Bartley thus not only fails to define accurately the legal interest which he claims

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[1] The dissent finds in a handwritten note appearing in one corner of a page in a ledger belonging to Handelsman proof of the nature of Bartley's claimed interest sufficient to withstand summary judgment. The evidence does show, and Mr. Handelsman does not dispute, that Bartley did receive a percentage interest in a gas drilling operation from Trendwell Oil, which is an independent company, and has received regular payments from Trendwell. However, showing the existence of this interest does not bring Bartley any closer to showing what interest, if any, Handelsman orally promised him with regard to future prospects. Bartley has not defined the nature of his Trendwell interest; he therefore cannot hold that interest out as showing that Handelsman and he agreed to the "same arrangement" for all future prospects Bartley brought to Handelsman's attention, or as showing that he was a "participant and partner in Handelsman Group," as Bartley claimed at his deposition and in his pleadings. As we have noted, the Supreme Court no longer thinks plaintiffs are entitled to try cases on the basis of a mere "scintilla" of disputed evidence.

Mr. Handelsman promised him, and fails to put forth sufficient evidence to support a jury verdict that he was entitled to any specific interest in future prospects developed by the alleged joint venture; he has affirmatively demonstrated that there was no meeting of the minds of the parties on this essential element of the contract which he claims. Where a plaintiff attempting to get past a motion for summary judgment has "fail[ed] to make a showing sufficient to establish the existence of an element essential to [his] case," the case cannot be allowed to proceed. *Celotex*, 477 U.S. at 323; *Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir. 1989).

III.

Happily for him, the litigation well is not completely dry for Mr. Bartley. The District Court erred in taxing costs against him in the amount of $489.70 for the defendants' Federal Express charges. Courts have held that such charges fall outside the specific provisions of

28 U.S.C. § 1920, although in some instances courts have included them as part of awarded attorney fees. *See Miller v. Carson*, 628 F.2d 346 (5th Cir. 1980); *Michigan Carpenters Council Health and Welfare Fund v. Charles Rogers Construction Co.*, 1988 U.S. Dist. LEXIS 17836 (W.D. Mich. 1988); *Lincoln Tang How v. Edward J. Gerrits, Inc.*, 756 F. Supp. 1540 (S.D. Fla. 1990), *aff'd*, 961 F.2d 174 (11th Cir. 1992); *Hollenbeck v. Falstaff Brewing Corp.*, 605 F. Supp. 421 (E.D. Mo., E. Div. 1985), *aff'd*, 780 F.2d 20 (8th Cir. 1985). The fact that the District Court found them "proper and reasonable" is irrelevant; the clerk or the court may tax only those costs and fees specified in the statute. Thus, this taxation of costs is reversed.[2]

On the grounds we have discussed, the order

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[2] Mr. Bartley also argues that he should not have been assessed for the defendants' travel expenses. As Mr. Handelsman points out in his brief, Bartley prevailed on this issue before the District Court, and such costs were not in fact assessed; the issue is therefore moot.

of the District Court granting the defendants' motion for summary judgment and dismissing Bartley's case is therefore AFFIRMED; the taxation of costs against Mr. Bartley for Federal Express expenses is REVERSED.

CONTIE, Senior Circuit Judge, dissenting.

Brian Bartley seeks a "ten percent carried interest" in Handelsman Venture Group's Ward Lake Drilling investment. Though Handelsman maintains, and my colleagues find, that Bartley "has failed to provide any details about the nature of the payments to which he claims an entitlement," Appellees' Brief at 26, Bartley clearly seeks the same "ten percent carried interest" that he currently receives from Handelsman Venture Group's Trendwell Oil investment:

> 11% Interest in Trendwell:
>
> | | | |
> |---|---|---|
> | R.H. | [Richard Handelsman] | 50% |
> | Jeff | [Wolfson] | 24% |
> | Mike | [Oesterle] | 16% |
> | Brian | [Bartley] | 10% |

Handelsman Venture Group's Accounting Ledger (Joint Appendix at 248).

Michigan Supreme Court precedent clearly proscribes summary judgment disposition of this action:

> A genuine issue of fact is created when the affidavits, pleadings, depositions, admissions and documentary evidence, viewed in the light most favorable to the party opposing the motion, might permit inferences contrary to the facts as asserted by the movant. Summary judgment is rarely appropriate where "motive and intent play leading roles."
>
> . . . .
>
> The trial court and the Court of Appeals majority carefully scrutinized the March 11 letter in order to ascertain the parties' intent. We eschew that approach, in part to emphasize that such a factual inquiry should have been made only by a trial court factfinder after consideration of all of the relevant evidence to be produced at trial on the point.

Opdyke Inv. Co. v. Norris Grain Co., 413 Mich. 354, 360-62 (1982) (citations omitted).

Accordingly, I dissent from the majority's opinion.

ISSUED AS MANDATE: 5-27-93
Costs: None
Filing Fee . . . . . $
Printing . . . . . $
TOTAL . . . . . $

FILED

Case No: 91-2201 , 92-1429

MAY 19 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD GREEN, Clerk

O R D E R

BRIAN M. BARTLEY

Plaintiff - Appellant

v.

RICHARD A. HANDELSMAN; HANDELSMAN VENTURE GROUP

Defendants - Appellees

BEFORE: MILBURN and BATCHELDER, Circuit Judges;
CONTIE, Senior Circuit Judge

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**. Judge Contie adheres to his original dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DIVISION OF MICHIGAN
SOUTHERN DIVISION

BRIAN M. BARTLEY,

Plaintiff, Case No. 90 CV 71419 DT

-vs- Hon. Horace W. Gilmore

RICHARD A. HANDELSMAN and
HANDELSMAN VENTURE GROUP,

Defendants.
_____/

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_____/

ORDER GRANTING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

At a session of said Court, held
in the City of Detroit, County
of Wayne, State of Michigan on
SEP 5 1991

PRESENT: HONORABLE HORACE W. GILMORE
U.S.D.C. Judge

This matter having come before the Court upon

Defendants' Motion for Summary Judgment; the Court having reviewed the submissions of the parties and having heard oral argument of counsel; and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that, for the reasons stated on the record, Defendants' Motion for Summary Judgment is granted, and Plaintiff's Complaint is hereby dismissed with prejudice.

HORACE W. GILMORE
HORACE W. GILMORE
U.S.D.C. Judge

APPROVED AS TO FORM:

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A TRUE COPY

CLERK, U.S. DISTRICT COURT EASTERN DISTRICT OF MICHIGAN
BY /s/
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN M. BARTLEY,

Plaintiff, HONORABLE HORACE W. GILMORE
Civil No. 90-1419

-vs-

RICHARD A. HANDELSMAN &
HANDELSMAN VENTURE GROUP,

Defendants.
_____/

ORDER DENYING MOTION FOR RECONSIDERATION

At a session of said Court, held in the Federal Building, City of Detroit, County of Wayne, State of Michigan,

on OCT 02 1991.

Present: Honorable Horace W. Gilmore
United States District Judge

Plaintiff having filed a Motion for Reconsideration of this Court's Order Granting Defendants' Motion for Summary Judgment, and the Court having reviewed the same, and the Court determining that no response or oral argument shall be allowed pursuant to Local Rule

17(m)(2);

IT IS ORDERED that Plaintiff's Motion for Reconsideration be and hereby is DENIED for the reasons stated at the hearing on Defendants' Motion for Summary Judgment held on August 8, 1991.

HORACE W. GILMORE
HORACE W. GILMORE
UNITED STATES DISTRICT JUDGE

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between -

(1) Citizens of different States;

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Rule 10. Consideration Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

Rule 40. Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) Form of Petition; Length. The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Permanent Carried Interest

A Carried Interest (q.v.) which is to be carried for the life of the lease, as opposed to a Limited Carried Interest (q.v.) which is to be carried for the initial development phase only of the operation. **A permanent carried interest is treated as the equivalent of a Net Profits Interest** (q.v.), and hence, when a lease is conveyed, the grantor retaining a permanent carried interest, the transaction is treated as a lease rather than as a sale **for tax purposes.** See Burke and Bowhay, *Taxation of Natural Resources* § 4.01 (1980); "Carried Interests Revisited by Tax Court," 8 *O&G Tax Q.* 159 at 161 (1959).

Syn.: Unlimited carried interest.

If a carried interest is to continue for the duration of the leasehold, it will be treated as a net profits interest for purposes of federal income taxation.